PP

v.

SAMSUDIN MANAP

HIGH COURT MALAYA, KUALA LUMPUR
SU GEOK YIAM J
[CRIMINAL APPEAL NOS: 42A-43-2010 & 42A-79-2010]
12 AUGUST 2012

CRIMINAL LAW: *Corruption - Corruptly receiving gratification - Police officer charged with offences of corruptly asking and receiving gratification - Whether failure to specify in the charge that accused had solicited monies on his own behalf or on behalf of another person fatal - Whether failure of prosecution to call witness fatal - Whether presumption under s. 42 Anti-Corruption Act 1997 triggered - Whether charge proven beyond reasonable doubt - Whether there was irresistible inference accused accepted monies as corrupt gratification - Anti-Corruption Act 1997, ss. 10(a)(bb), 11(a)*

CRIMINAL LAW: *Corruption - Presumption under s. 42 Anti-Corruption Act 1997 - Presumption only shifts evidentiary burden to accused - Legal burden to rest on prosecution*

CRIMINAL PROCEDURE: *Appeal - Conviction, against - Police officer charged with offences of corruptly asking and receiving gratification - Whether failure to specify in charge that accused solicited monies on his own behalf or on behalf of another person fatal - Whether failure of prosecution to call witness fatal - Whether presumption under s. 42 Anti-Corruption Act 1997 triggered - Whether charge proven beyond reasonable doubt - Whether there was irresistible inference that accused accepted monies as corrupt gratification - Anti-Corruption Act 1997, ss. 10(a)(bb), 11(a)*

CRIMINAL PROCEDURE: *Sentencing - Corruption - Principles of sentencing - Necessary to impose sentence of imprisonment - Graveness of corruption - Necessity to impose sufficiently deterrent sentences*

EVIDENCE: *Burden of proof - Evidential burden of proof on prosecution - Defence ought not to be called to resolve doubt in favour of prosecution's case - No onus on accused to prove innocence - Burden of proving guilt to rest on prosecution*

The accused was charged with two counts of corruption under the Anti-Corruption Act 1997 (the "Act") which were (i) an offence under s. 10(a)(bb) of the Act ('1st count'); and (ii) an offence under s. 11(a) of the Act ('2nd count'). According to the charge in the 1st count, the accused in his capacity as the Assistant Investigating Officer holding the rank of Sergeant, attached to the Police District Headquarters of Brickfields had corruptly solicited, for his own behalf, a sum of RM3,000, being a gratification from PW1, as an inducement to settle two cases involving PW3 and PW8 who were being investigated for the offences of criminal breach of trust and conspiracy. In the 2nd count, the accused was alleged to have corruptly agreed to receive a sum of RM2,800 in cash from the same person in the same circumstances. At the close of the prosecution case, the trial judge held that the prosecution had failed to establish a *prima facie* case against the accused on the 1st count of corruption and thus acquitted and discharged the accused. The accused was asked to enter his defence in relation to the 2nd count. The accused in his defence claimed that he had taken the monies to find a lawyer to assist PW3 and PW8. At the close of the defence case, the accused was convicted and sentenced to two years imprisonment and a fine of RM14,000 on the 2nd count. The prosecution appealed against the decision of the trial judge in acquitting and discharging the accused on the 1st count ("main appeal") and the accused appealed against the decision of the trial judge in finding him guilty on the 2nd count ("cross-appeal"). The trial judge was of the view that the charge for the 1st count was defective because it was not specified in the charge that the accused had solicited the sum of RM3,000 on his own behalf or on behalf of another person.

Held (dismissing the main appeal and the cross-appeal; affirming conviction and sentence imposed by trial court on 2nd charge):

(1) There was no necessity for the prosecution to amend the charge to add the words "or on behalf of any other person" because the words were not essential particulars to the charge. Firstly, s. 10(a)(bb) makes it an offence for any person in a capacity similar to that in which the accused was in at the material time to solicit corruptly a bribe to perform an act relating to his principal's affairs, irrespective of whether the accused had solicited the gratification as a bribe on his own behalf or on behalf of any other person. Secondly, even if the

missing words were essential to the charge, the defect was curable by s. 422 of the Criminal Procedure Code as it did not occasion a failure of justice to the accused. The accused was never misled by the charge. (*Tunde Apatira v. PP* (refd))

(2) The failure of the prosecution to call one Halim as a prosecution witness was fatal to the prosecution case. It had given rise to a doubt whether the accused did in fact solicit from PW1 the payment of the RM3,000 as a bribe. The benefit of the doubt must be given to the accused. It is trite law that the trial judge ought not to call for the defence in order to resolve the doubt in favour of the prosecution because an accused person bears no onus to prove his innocence. The burden to prove the guilt of the accused beyond reasonable doubt rests throughout on the prosecution *(PP v. Mohd Radzi Abu Bakar* refd))

(3) Section 42 of the Act had not been triggered off as far as the 1st count of corruption was concerned. Even if it was triggered off, it was only the evidentiary burden which had shifted to the accused. The legal burden rested throughout on the prosecution (*PP v. Mohd Radzi Abu Bakar.* (refd))

(4) The prosecution had proved the 2nd count against the accused beyond reasonable doubt. It was most unlikely that the accused had intended to use the money towards getting a lawyer to act for PW3 and PW8 in the two cases. In none of the tape recorded conversations between PW1 and the accused did the accused mention transferring the RM2,800 which PW1 had banked into his bank account into the bank account of the lawyer.

(5) The irresistible inference that could be drawn was that the accused had agreed to accept the RM2,800 as a corrupt gratification as an inducement to him to close the two cases even though he knew that the two cases could not be closed.

(6) Corruption is a very grave offence. It is necessary to impose a sentence of imprisonment for corruption as a sentence of fine has no deterrent effect. Corruption is a serious menace which must be eradicated otherwise the people will lose heart and become disillusioned with the Government and also the courts. One way of doing that is for the courts to impose sufficiently deterrent sentences on convicted offenders *(Hamidon Mat Yatim v. PP* (refd); *PP v. Dato' Waad Mansor* (refd); *PP v. Mohamed Fathi Hj Ahmad* (refd)).

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Hamidon Mat Yatim v. PP [1995] 3 CLJ 724 HC ***(refd)***
PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Mohamed Fathi Hj Ahmad [1978] 1 LNS 157 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 10(a)(bb), 11(a), 16, 42
Criminal Procedure Code, s. 422

For the appellant - Mohd Sophian Zakaria DPP
For the accused - Zamri Ibrahim; M/s Hanif & Co

Reported by Amutha Suppayah

JUDGMENT

Su Geok Yiam J:

Background

[1] There are two appeals which arose out of a single case registered against the accused, namely, Shamsudin bin Manap, in the Kuala Lumpur Sessions Court (10). In that case the accused was charged with two counts of corruption under the Anti-Corruption Act 1997 (Act 575) (the "Act").

[2] The 1st count charged him, in his capacity as the agent of the Government of Malaysia, being the Assistant Investigating Officer ("A.I.O.") holding the rank of sergeant, attached to the Police District Headquarters of Brickfields, in the Federal Territory of Kuala Lumpur, with having corruptly solicited, for his own behalf, a sum of RM3,000, being a gratification from one Salwa binti Abu Zar, on 11 January 2008, at about 3pm, at the office of the Criminal Investigation Department of the Police District Headquarters of Brickfields, as an inducement to him to perform an act in relation to the affairs of his principal ie, to settle two cases involving one Norsyahiza binti Abu Zar and one Ahmad Feysall bin Abu Zar, who were being investigated for the offences of criminal breach of trust and conspiracy, respectively, allegedly

committed by them at the Carrefour Hypermarket, at Sri Petaling in Kuala Lumpur, and that he had thereby committed an offence under s. 10(a)(bb) of the Act and punishable under s. 16 of the Act.

[3] The 2nd count charged him, in his capacity as the agent of the Government of Malaysia, being the Assistant Investigating Officer ("A.I.O.") holding the rank of sergeant, attached to the Police District Headquarters of Brickfields, in the Federal Territory of Kuala Lumpur, with having corruptly agreed to receive a sum of RM2,800 in cash for his own behalf being a gratification from one Salwa binti Abu Zar (*vide* Maybank account No: 114263069735) on 16 January 2008, at about 11.44am, at counter No: 5 at the Maybank Branch at the Dayabumi Complex at F1-26 & 27, 1st floor, at Jalan Sultan Hishamuddin, in the Federal Territory of Kuala Lumpur, as an inducement to him to perform an act in relation to the affairs of his principal ie, to settle two cases involving Norsyahiza binti Abu Zar and one Ahmad Feysall bin Abu Zar, who were being investigated for the offences of criminal breach of trust and conspiracy, respectively, allegedly committed by them at the Carrefour Hypermarket, at Sri Petaling in Kuala Lumpur, and that he had thereby committed an offence under s. 11(a) of the Act and punishable under s. 16 of the Act.

[4] The prosecution called 14 witnesses.

Decision of the trial judge on the 1st count

[5] On 31 March 2010, at the close of the prosecution case, the trial judge was satisfied that the prosecution had failed to establish a *prima facie* case against the accused on the 1st count of corruption. He recorded an order of acquittal and discharge for the accused on the 1st count of corruption without calling him to enter his defence.

Decision of the trial judge on the 2nd count

[6] The trial judge was satisfied that the prosecution had succeeded in establishing a *prima facie* case against the accused on the 2nd count of corruption. He ordered the accused to enter his defence.

[7] On 31 May 2010, at the close of the defence case he was satisfied that the defence had failed to cast a doubt on the prosecution case. He was also satisfied that the prosecution had proved the 2nd count of corruption against the accused beyond all reasonable doubt.

[8] He convicted the accused and sentenced him to two years imprisonment and a fine of RM14,000 (which was five times the amount of the gratification which he had corruptly agreed to receive) in default ten months imprisonment (the "said sentence") on the 2nd count of corruption pursuant to s. 16 of the Act (the "decision of the trial judge").

[9] Being dissatisfied with the decision of the trial judge in acquitting and discharging the accused on the 1st count of corruption the Public Prosecutor (the "PP") filed the 1st appeal (the "main appeal") to the High Court.

[10] Being dissatisfied with the decision of the trial judge in finding him guilty, convicting him and in handing down the said sentence on him the accused filed the 2nd appeal (the "cross-appeal") to the High Court.

Decision of this court

[11] Having heard the parties and having considered their submissions and the appeal record, this court was satisfied that the main appeal had no merits. This court dismissed it and upheld the order of acquittal and discharge which was recorded by the trial judge in favour of the accused. This court was satisfied that the cross-appeal had no merits. This court dismissed it and upheld the conviction and the said sentence (the "decision of this court").

[12] Being dissatisfied with the decision of this court both the PP and the accused have each filed a notice of appeal to the Court of Appeal against the decision of this court.

[13] Since the accused was a policeman and he would be dismissed if he was not granted a stay of execution of his sentence of two years imprisonment this court allowed his oral application for a stay with bail set at RM3,000 with one surety. Nevertheless, this court dismissed his oral application for a stay of execution of his fine of RM14,000 in default ten months imprisonment.

[14] This court also dismissed his oral application for leave to pay his fine by way of installments and ordered that it be paid forthwith. This court was of the view that the accused had not shown any special reason why the payment of the fine ought to be stayed or why he deserved to be given more time to pay his fine. There was no affidavit affirmed and filed by him to state that he had no assets or financial resources which could be utilized to pay the fine forthwith.

Reasons for the decision of this court

[15] Below are the reasons why this court made the decision:

[16] This court was satisfied that the trial judge made only one error in his grounds of judgment for arriving at his decision in respect of the 1st count of corruption.

[17] The trial judge was of the view that the charge for the 1st count of corruption was defective because it was not specified in the charge that the accused had solicited the sum of RM3,000 on his own behalf or on behalf of another person. According to the trial judge this omission was fatal to the prosecution case.

[18] The reason is because there was positive evidence based on the sworn oral testimony of the key prosecution witness, namely, Salwa binti Abu Zar (PW1), which was corroborated by the 1st taped recorded phone conversation between PW1 and the accused that the accused had said that the money was asked for by his superior officer and that he on his own had no courage to ask for the money.

[19] This court was of the view that there was no necessity for the prosecution to amend the charge to add the words "or on behalf of any other person" because the words were not essential particulars to the charge. There are two reasons.

[20] Firstly, s. 10 (a)(bb) makes it an offence for any person in a capacity similar to that in which the accused was in at the material time to solicit corruptly a bribe to perform an act relating to his principal's affairs, irrespective of whether the accused had solicited the gratification as a bribe on his own behalf or on behalf of any other person.

[21] Secondly, even if the missing words are essential to the charge, the defect is curable by s. 422 of the Criminal Procedure Code (the "CPC") as it did not occasion a failure of justice to the accused in the instant case (see *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 FC).

[22] The accused was never misled by the charge. It was expressly put in cross-examination to PW1 by the learned defence counsel that the money was asked for by the accused for the purpose of paying for the services of a lawyer to represent PW3 and PW8 and that the money was not intended as a bribe for him to close the two cases.

[23] The accused was able to understand and appreciate the prosecution case against him which was essentially that upon the request of PW1 to settle the two cases involving PW5 and PW8 the accused had requested for RM1,500 to be paid to settle each of the two cases.

[24] The accused was also able to prepare and present his defence in the best possible way. This is clearly borne out when this court scrutinized the questions which were posed to the prosecution witnesses by the learned defence counsel for the accused and his explanation in his defence to the 2nd count of corruption which he gave *vide* his sworn oral testimony.

[25] In his examination-in-chief, the accused said that when PW1 asked him for assistance to settle the two cases he told her he had no power to do that. He said he also told PW1 that both PW3 and PW8 had to be charged in court. Upon hearing this, he said PW1 was shocked.

[26] So the accused offered his assistance to PW1 to find a lawyer to assist PW3 and PW8. The accused said he told PW1 that the lawyer would usually charge RM 1,500 for each case. Since there were two cases the total amount was RM 3,000. The accused said he also told PW1 that he would return the money to her if he could not find a lawyer to act for PW3 and PW8 in the two cases.

[27] He said he also told PW1 that she could on her own find a lawyer to assist PW3 and PW8.

[28] However, PW1 accepted the assistance offered by the accused and agreed that the accused would look for a lawyer for PW3 and PW8 and she would pay for the services of the lawyer.

[29] The accused said the lawyer who he had in mind at that time was DW2. He said DW2 used to be his superior officer. He explained that out of habit he had used the malay words "pegawai"or "pegawai atasan" which mean "officer" or "superior officer" in english to refer to DW2 because DW2 was previously his "officer" or "superior officer" before DW2 left the police force to become a lawyer.

[30] According to the accused, PW1, subsequently, called him and asked for a reduction of the RM3,000 which was to be paid to the lawyer. He told her it could be reduced by about RM100 to RM200. That was why the amount of RM3,000 was reduced to RM2,800.

[31] He also explained that he had invited PW1 to go with him to the office of the lawyer to make payment of the money to the lawyer but PW1 declined and asked the accused to handle it on her behalf. PW1 then asked him to give to her the number of his bank account in order that she could pay the RM2,800 meant for the lawyer into his account.

[32] He had withdrawn a sum of RM500 from his bank account in order to pay it to the lawyer as it was the fee which was charged by the lawyer for the opening of a file in respect of the two cases. He had conveyed this to PW1. He had also phoned DW2 to speak to him about the two cases and to make an appointment with DW2 to go to the latter's office to make the payment. However, DW2 was out of town as he was in Kuala Berang. DW2 requested him to return his call.

[33] He did not return DW2's call because he had, subsequently, lost his mobile phone. After that he was arrested by the ACA. So he could not call DW2 to give more information of the two cases to DW2.

[34] In his cross-examination, the accused changed certain crucial parts of his explanation in his earlier testimony regarding the purpose of the payment of the RM3,000. He said the RM3,000 was for a dual purpose. It was to be used by him to pay the RM500 fee to the lawyer for opening the file and also by the

A lawyer as the security to secure the release of PW3 and PW8 on bail by the court upon the charging of PW3 and PW8 in court in respect of the two cases.

[35] The accused also attempted to explain what he meant when
B he said he told PW1 that he could assist her to settle the two cases. He said that what he had really meant was he could assist to get a lawyer to represent PW3 and PW8 in their trial if they should claim trial or in their mitigation of sentence if they should plead guilty.

C

[36] When he was re-examined he said he did not lodge any report against PW1 with the ACA, presumably, for lodging a false report against him.

[37] In the sworn oral testimony of DW2, DW2 confirmed that
D he could be said to be the accused's "officer" or "superior officer" before DW2 left the police force to become a lawyer. This was because previously he was attached to the Kuala Lumpur Courts as the senior police officer who was in charge of criminal prosecutions (the "O.C. courts") and the accused was answerable
E to him in that capacity.

[38] DW2 had, subsequently, left the police force to take up law. At the material time he was already a practicing lawyer. He confirmed that the accused had made the phone call to him to ask
F him to take on the two cases. He also confirmed that he had told the accused that he was outstation in Kuala Berang. He also told the accused that he usually charged RM500 to open a file. He had also asked the accused to call him back and to see him in order to give him all the particulars. The accused did not do that.

G

[39] Later he came to know that the accused was arrested by the ACA. He felt that it ought not to have happened because the accused was merely trying to assist two siblings who had been arrested by the police. He also testified that he would usually charge RM1,500 in order to submit a plea in mitigation of
H sentence for an accused person who has pleaded guilty.

[40] When he was cross-examined by the learned DPP he said his sworn oral testimony was true and was not concocted in order to assist the accused in order that the accused could be
I acquitted.

[41] When he was re-examined he said he did not go to the ACA to give his statement to the ACA concerning the phone call which the accused had made to him in relation to the two cases in order to counter, presumably, the allegations of corruption made by PW1 against the accused. However, he did not explain why he did not do that even though the arrest of the accused by the ACA was a very serious matter. A B

[42] Apart from that one error this court was of the view that the trial judge acted correctly when he made his decision based on the evidence adduced by the prosecution before him and the reasons given by him in his grounds of judgment at pp. 189 to 223 of the appeal record. C

[43] He had evaluated the testimonies of the prosecution witnesses and made correct findings of primary facts. He also made correct inferences from them. He had also applied the correct principles of law to the facts and circumstances of the case before him. D

[44] The trial judge was of the view that there was a material gap in the prosecution case against the accused because the prosecution did not call one Halim whom PW1 said was her adopted brother as a witness to testify against the accused. The trial judge was of the view that Halim was a material witness. He then drew an adverse inference against the prosecution for its failure to call Halim as a prosecution witness. E F

[45] The evidence showed that after PW3 was arrested by the police on the day of the incident at the Carrefour Hypermarket and taken to the 1st police station, PW8 had taken PW1 and PW2 to the police station. However, when they were at the 1st police station, the police detained PW8 on suspicion that he had conspired with PW3 to commit the offence of criminal breach of trust. G

[46] Subsequently, PW3 and PW8 were transferred to the 2nd police station. So PW1 called Halim for assistance. He came and took them to the 2nd police station. H

[47] PW1 had also consulted Halim after she, PW2, PW3 and PW8 had met up with the accused at the 2nd police station on 11 January 2008 to plead with the accused to settle the two cases involving PW3 and PW8, respectively, and the accused had allegedly asked for the payment of the RM3,000 gratification as a bribe in order to do that. I

[48] What is most pertinent is that PW1 also categorically said the accused told her and the three others that the prescribed procedure had to be followed when she asked for his assistance to settle the two cases involving PW3 and PW8.

[49] Halim had also advised PW1 to follow the prescribed procedure. But what was the prescribed procedure? She said she did not know because she did not ask the accused and Halim.

[50] None of the other witnesses could shed any light on this important fact-in-issue.

[51] Therefore, since the four of them were interested witnesses and were also active accomplices it was important for the prosecution to call Halim, a neutral and independent witness, to testify as to what was narrated by PW1 to him soon after the meeting with the accused on 11 January 2008 and what did he mean by his use of the words "prescribed procedure" to PW1 in order to enable the trial judge to compare and weigh their sworn oral testimonies and to assess the consistency or otherwise of PW1's sworn oral testimony and to evaluate the credibility of PW1 and the three other interested witnesses.

[52] This court agreed with his view for the reasons given by him that the failure of the prosecution to call Halim as a prosecution witness was fatal to the prosecution case. It had given rise to a doubt whether the accused did in fact solicit from PW1 the payment of the RM3,000 as a bribe in order to perform an act in relation to his principal's affairs. The benefit of the doubt must be given to the accused.

[53] It is trite law that the trial judge ought not to call for the defence in order to resolve the doubt in favour of the prosecution because an accused person bears no onus to prove his innocence. The burden to prove the guilt of the accused beyond reasonable doubt rests throughout on the prosecution (see *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 FC).

[54] In this case s. 42 of the Act had not been triggered off as far as the 1st count of corruption is concerned. Even if it was triggered off it is only the evidentiary burden which has shifted to the accused. The legal burden rests throughout on the prosecution (see *PP v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457).

[55] In respect of the 2nd count, the trial judge was of the view that there was sufficient evidence based on the sworn oral testimony of PW1 which was corroborated by the three tape recorded phone conversations between PW1 and the accused and the other evidence adduced by the prosecution that the accused had agreed to receive the sum of RM2,800 which was paid into the accused's bank account by PW1 upon the consent of the accused who had given the account number to PW1 *vide* an sms as a corrupt gratification to induce him to settle or close the criminal breach of trust case against PW3 and the conspiracy to commit criminal breach of trust case against PW8.

[56] The trial judge did not believe the explanation of the accused because the accused did not mention in his cautioned statement, D12, which was recorded from him soon after his arrest, that the RM3,000 was for the purpose of paying the services of a lawyer, namely, DW2, to represent the two siblings. DW2's name was also never suggested to any of the prosecution witnesses, in particular, PW1.

[57] DW2 had also left the police force a good six years before the date the act of corruption was alleged to have been committed by the accused.

[58] The trial judge was, therefore, of the view that the accused's explanation was an after-thought.

[59] This court was satisfied that based on the appeal record the prosecution had proved the 2nd count against the accused beyond reasonable doubt. It was most unlikely that the accused had intended to use the money towards getting a lawyer to act for PW3 and PW8 in the two cases. In none of the tape recorded conversations between PW1 and the accused did the accused mention transferring the RM2,800 which PW1 had banked into his bank account into the bank account of the lawyer, let alone, to DW2.

[60] In fact one of the replies of the accused which was clearly recorded was to the effect that after the RM2,800 ("the money") was paid to his officer or superior officer the two cases would be NFA (No Further Action) and if they were not NFA the money would be returned to PW1.

[61] If the money was in fact intended to be used by the accused to pay for the services of DW2 there is no question whatsoever arising of the possibility of the repayment of the money to PW1.

[62] If the two siblings were to be charged in court as directed by the S.I.O. there was no possibility of the closure of the two cases against the two siblings. The accused was aware of that direction. The irresistible inference that could be drawn was that the accused had agreed to accept the RM2,800 as a corrupt gratification as an inducement to him to close the two cases even though he knew that the two cases could not be closed.

[63] This court was satisfied that the withdrawal by the accused of a sum of RM500 from his bank account after PW1 had banked the money into his account could not be for any other purpose except that it was solely for his own benefit.

[64] If it was true what was said by DW2 that the RM500 was to be paid to him by the accused as a fee for the opening up of the file for the two cases, surely DW2 would have promptly gone to the ACA to have his statement recorded by the ACA to vindicate the accused and to prevent the charging of the accused by the ACA and if he was charged to ensure that the accused had a good defence during the trial instead of waiting until the accused is charged in court and only then come to court to give evidence in favour of the accused.

[65] This court is of that view because DW2 was formerly a senior police officer overseeing prosecutions of criminal cases in the Kuala Lumpur Courts as the OC Courts and he would definitely know how important let alone crucial for him to give his statement to the ACA at the earliest opportunity available. This omission on his part coupled with the failure or omission of the accused to mention DW2's name and role in the instant case when considered against the backdrop of the prosecution case and the content of the testimonies of the accused and DW2 resulted in this court being of the view that the accused's explanation was not reasonable and was not consistent with his innocence on the 2nd count of corruption as it was not one which this court considered was more likely than not that it was true.

[66] In other words this court was of the view that the accused's explanation was most probably untrue. The accused was a very experienced police officer at the material time. At the time of sentencing he had served in the police force for 28 years which is a considerable period of time to be in any service. He had directions to charge both the siblings, PW3 and PW8. He delayed charging PW3 and PW8 for six months and gave various reasons to justify his delay.

[67] Since it was already in his mind to ask DW2 to represent the two siblings he could have easily informed PW1 that the officer or superior officer who had requested for the payment of the money was his former officer or superior officer who had since become a lawyer. He could have easily informed PW1 that the request for the RM3,000 was from DW2 in order to mitigate on sentencing in the event both siblings pleaded guilty after they were charged in court. He could also have easily informed PW1 that a sum of RM500 had first to be paid to DW2 to open up a file for the two cases before the matter could proceed further.

[68] He chose not to do that. He chose to give the impression to PW1 that the officer or superior officer who had asked for the money was a serving police officer who had power to issue directions to the accused in respect of the investigation conducted by PW1 and for the closure of the investigation against PW3 and PW8.

[69] In *Thavanathan Balasubramaniam v. PP* [1997] 3 CLJ 150 FC, the court held as follows:

> … once it was proved that the money RM 15,000 had been given or received by the accused, the presumption under s. 14 of the Prevention of Corruption Act 1961 arose that the money had been given and received corruptly as an inducement or reward to acquit and discharge PW2 of the offence in the criminal case, and it was for the accused to give an innocent explanation which the court considered more likely than not that it was true, ie on a balance of probabilities, the test applied in civil proceedings: *PP v. Yuvaraj* [1969] 2 MLJ 89 (PC).

[70] Therefore, this court was satisfied that the conviction of the accused for the 2nd count of corruption was justified and fair based on a close examination of the case for the defence against the overwhelming evidence adduced by the prosecution. There was only one possible verdict which the trial judge could arrive at

the conclusion of the trial. It was that the accused was guilty of corruptly agreeing to receive the RM2,800 as a bribe as specified in the 2nd count.

[71] The evidence when considered in its totality showed that the money was never intended by the accused to be used by him to pay for the services of a lawyer to represent PW3 and PW8.

PW1's sworn oral testimony

[72] Since PW1 is the key prosecution witness, being the complainant for both counts, the court had scrutinized her testimony.

[73] Her sworn oral testimony against the accused is as follows:

[74] PW1 had testified that her younger sister, namely, Norsyahiza binti Abu Zar (PW3), worked as a cashier in the Carrefour Hypermarket.

[75] According to PW1, on the morning of 27 June 2007, she and her family members which comprised her older brother, namely, Ahmad Feysall bin Abu Zar (PW8), her older sister, namely, Salina binti Abu Zar (PW2), her aunt, namely, Halimah, and her eight months old daughter, namely, Wan Nur Shasha had gone to the Carrefour Hypermarket in Sri Petaling to do some shopping.

[76] At the Carrefour Hypermarket they took several items from the shelves and put them into two trolleys. They then pushed the two trolleys to the cashier's counter which was manned by her younger sister, Norsyahiza binti Abu Zar (PW3).

[77] Her older brother accompanied by her aunt pushed the 1st trolley to the cashier's counter. She saw her aunt making payment for the items in the 1st trolley to PW3. She then pushed the 2nd trolley to the same cashier's counter where she made payment for the items in her trolley to PW3. She was accompanied by her older sister (PW2).

[78] She was unaware that her younger sister (PW3) did not scan some of the items in the two trolleys resulting in her aunt and her not paying for those items.

[79] PW2 then allowed all of them to exit her counter with all the items including the unpaid items. Upon exiting the counter they were stopped by the security guards who checked the items in the two trolleys. The security guards then detained them and the two trolleys. They also called the police.

[80] When the police arrived they detained Norsyahiza binti Abu Zar (PW3) and took her to the police station. PW8 then sent her aunt and her child back to her house leaving her and PW2 at the Carrefour Hypermarket.

[81] PW8 then returned to the Carrefour Hypermarket and took her and PW2 to the police station. She could not recall the name of the police station (the "1st police station"). At the 1st police station, PW8 was detained by the police on the ground that he was also involved in the non-scanning of some of the items by PW3. Subsequently, both PW8 and PW3 were transferred to the Brickfields Police District Headquarters (the "2nd police station").

[82] PW1 then phoned her adopted brother and asked for his assistance to send her and PW2 from the 1st police station to the 2nd police station. When they arrived there they saw that the hands of PW8 and PW3 were cuffed and both of them were inside a room. They waited there until the evening when PW8 and PW3 were released on police bail without the payment of any security. She had stood as the surety for PW3 while PW2 stood as the surety for PW8.

[83] Subsequently, she, PW2, PW8 and PW3 met up with the accused at the Brickfields Police District Headquarters. The accused was the Investigating officer of the two cases involving PW8 and PW3. The purpose of the meeting with the accused at the Brickfields Police District Headquarters was to extend the police bail for PW8 and PW3.

[84] She also alleged that, subsequently, upon the accused's request, the four of them then met up again with the accused at the Brickfields Police District Headquarters. The accused told them that PW3 had committed criminal breach of trust and that PW8 had committed the offence of conspiracy as he had conspired with PW3 to commit the offence of criminal breach of trust by PW3, presumably, by not scanning the unpaid items.

[85] She also alleged that the accused then asked her and PW2 to get ready a sum of RM1,500 each ie, a total sum of RM3,000 in order to "tutup kedua-dua kes" in malay which mean in english to "close the two cases" involving PW8 and PW3. She understood his words to mean that the accused would be able to settle the two cases involving PW3 and PW8.

[86] She discussed his request with PW2. They then asked the accused for some time to consider his request. They then went home. While they were at home they discussed his request again. She also phoned her adopted brother to ask him for his advice.

[87] Subsequently, she received a phone call from PW2 asking her to go to the office of the ACA in the Federal Territory of Kuala Lumpur. She went there and she was told that her father had gone there to inquire about the accused's request, presumably, for payment of the total sum of RM3,000 to close the two cases involving PW3 and PW8.

[88] At the office of the ACA she agreed to lodge a report against the accused for corruption. She identified P1 as her report which she had lodged on 15 January 2008.

[89] After she had lodged P1 she received a call from the accused asking her whether she had paid the money into his bank account. The accused had texted to her his account no. in Maybank *vide* the short messaging system ("sms").

[90] At the office of the ACA she agreed to phone the accused and to have her phone conversation with the accused recorded on tape by the ACA officers. There were altogether three phone conversations between PW1 and the accused which were recorded on tape by Henrita Serai Anak Andrew Lenggie (PW9), an ACA officer.

[91] In PW1's 1st phone conversation with the accused she asked the accused for a reduction of the total sum from RM3,000 to RM2,800. The accused agreed.

[92] In PW1's 2nd phone conversation with the accused she confirmed that she would pay the RM2,800 into his bank account on the following day. The accused then texted to her his account no. in Maybank *vide* an sms. In his sms the accused also asked her whether she could bank in the money before 11am the

following day. She received the sms while she was still in the office of the ACA. After that he texted her again regarding the same matter but she could not recall how many times he did that.

[93] Each time she received his sms she would reply "Insyallah saya cuba" in malay which means "God willing I shall try" in english.

[94] On the next day, on 16 January 2008, she went to Maybank together with PW2 and an ACA officer. She banked into the accused's account a sum of RM2,800 in cash which was handed over to her by the ACA officer. She filled in two copies of the pay-in slip, ie, the customer's copy (P3A) and the bank's copy (P3B), for the amount. After that she went to the cashier's counter to complete the pay-in transaction of the cash into the accused's account.

[95] She was able to identify both copies of the pay-in slip.

[96] She then went back to the office of the ACA and she phoned the accused. In PW1's 3rd phone conversation with the accused she informed the accused that she had banked the RM2,800 into his account. She could not remember the reply of the accused. Her phone conversation with the accused was recorded on tape by PW9.

[97] She alleged that she then lodged a 2nd report against the accused. It was taken down by an ACA officer, namely, Hidayah Mohd Yusoff (PW13). It concerned the payment of the RM2,800 into the accused's account.

[98] Subsequently, the accused phoned her twice and on both occasions he scolded her for reporting him to the ACA. On both occasions he asked her who had lodged the report against him. On both occasions she lied to him and she said she did not know.

[99] Her testimony in her cross-examination by the learned defence counsel was unshaken.

[100] However, it came to light that it was not the first time that her family members had used PW3's counter in order that they could avoid making payments for some of the items which they had purportedly purchased from the Carrefour Hypermarket.

[101] Nevertheless, she denied that she had prior to the incident on 29 June 2007 conspired with PW3 to take out items at her counter without making payment for them.

[102] As for PW8, she agreed with the suggestion of the learned defence counsel that it was possible that PW8 was under suspicion by the security guard at the Carrefour Hypermarket for having conspired with PW3 to take out items at PW3's counter without making payment for them.

[103] PW3 disagreed that after the incident on 29 June 2007 she and her family members who were detained by the security guard, namely, Veronica, had quarreled with Veronica and had forced Veronica to withdraw her police report concerning the criminal breach of trust against PW3. She said she was unaware that Veronica had then lodged a report with the ACA concerning the incident.

[104] She also agreed that it was her mother, namely, Salmiah bte Lope (PW4), who was the first to initiate the settlement of PW3's and PW8's cases (the "two cases") with the accused by phoning and speaking with the accused a few days after the incident to request him to settle the matter.

[105] Six months after the incident, she was asked by PW2 to go to the accused's office at the police station to meet up with him to discuss about the settlement. She went there together with PW2, PW3 and PW8. PW2 did most of the talking. The accused told them that everything must be done in accordance with the procedure.

[106] She maintained what she had said in her examination-in-chief that the accused then asked for RM1,500 to settle each of the two cases. The accused said the RM1,500 was for each of the two persons. He meant PW3 and PW8. The accused also said that the money was to close the matter. He used the word "tutup" in malay which means "close" in english. He did not say that PW3 and PW8 would not be charged.

[107] She did not know whether the accused had the power to charge PW3 and PW8 in court and/or to close the matter but that was his request.

[108] She categorically disagreed with the suggestion of the learned defence counsel that the accused did not at any point in time during their discussion asked for any money from any of them. She also categorically disagreed with the suggestion of the learned defence counsel that it was unreasonable for the accused to request for money at the police station.

[109] She agreed with the suggestion of the learned defence counsel that they had pleaded with the accused to settle the two cases. However, she did not know that one of their pleas to the accused was for the accused to get a lawyer to represent PW3 and PW8 in the event that they were charged in court.

[110] Nevertheless, she categorically disagreed with the suggestion of the learned defence counsel that her family members had asked the accused for an account number for the purpose of making payment for the charges of the lawyer, presumably, who was to be retained to act on behalf of PW3 and PW8.

[111] After the four of them left the accused's office, they went home. She then asked her adopted brother, namely, Halim for advice, presumably, concerning the accused's request. This court noted that in her examination-in-chief she had mentioned that Halim had taken her and PW2 to the Brickfields Police District Headquarters on the day of the incident after the police had arrested and taken PW3 and PW8 to the police station. The accused had told them that the punishment for criminal breach of trust was imprisonment and that if PW3 and PW8 were convicted they may have to serve time in prison. They were shocked as they did not wish that to happen to PW3 and PW8.

[112] Halim advised her to follow the prescribed procedure but he did not explain to her the prescribed procedure.

[113] It then came to light in her cross-examination that Halim was also a police sergeant at the material time. Halim was also attached to the same police station as the accused, ie, the Brickfields Police District Headquarters at the material time.

[114] She was then asked by PW2 to go to the office of the ACA where she came to know that her father had already gone there prior to her visit there.

[115] At the office of the ACA she had a six hours discussion with the ACA officer concerned before she lodged her report (P2) against the accused. She disagreed with the suggestion that it was PW2 who had asked her to lodge her report (P2). She said she lodged it on her own volition.

[116] It then came to light in her cross-examination by the learned defence counsel, that the accused had informed her for the very first time *vide* an sms that the accused had mentioned that the money was to request the assistance of the superior officer of the accused. She did not ask the accused to explain what he meant by to request the assistance of the superior officer of the accused.

[117] She agreed with the suggestion of the learned defence counsel that she was coached by the ACA's officer (PW9) before and when she made the tape recorded phone calls to the accused at the office of the ACA. PW9 had coached her repeatedly to mention money, to get the amount of money correct and to bank the money into the account in the bank in her tape recorded phone calls which she had made to the accused at the office of the ACA.

[118] She agreed with the suggestion of the learned defence counsel that she had benefitted both ways, ie, firstly, she did not have to provide the RM2,800 to pay into the bank account of the accused as it was provided by the ACA and, secondly, both PW3 and PW8 were not charged in court in respect of the incident at the Carrefour Hypermarket.

[119] She reiterated that she lodged a 2nd report after she had paid the RM2,800 into the bank account of the accused. She also reiterated that on the same day that she paid the money into the bank account of the accused, the accused phoned her, scolded her for lodging the report with the ACA and asked her who had lodged the report.

[120] She explained that she had lied to the accused when she told him that she did not know who had lodged the report because she was instructed by the ACA officer to say to the accused she did not know who had lodged the report with the ACA. She did not know what happened to the RM2,800 that she had banked into the accused's account.

[121] Her testimony in her re-examination remained largely consistent with that in her cross-examination except for two inconsistencies. The 1st was in regard to whether she had prior knowledge that her family members had made use of PW3's counter to exit with items not paid for. In her cross-examination she had agreed with the suggestion of the learned defence counsel that there were prior occasions when her family members had exited at PW3's counter without making payment for some of the items they had purchased. When she was re-examined she said she did not know.

[122] The 2nd was in regard to whether on the day of the incident she and PW2 had paid for all the items in the two trolleys which they purchased at PW3's counter. In her cross-examination she agreed with the suggestion of the learned defence counsel that on the day of the incident PW3 and PW8 were arrested because there were unpaid items costing RM126.29 and she had also said that she could not remember the particulars of the unpaid items. When she was re-examined she said that she had paid for all the items in her trolley and PW2 had also paid for all the items in PW2's trolley.

[123] In her re-examination, she also explained why it took a six hours discussion with the officer of the ACA before she lodged her report. It was to discuss whether it was necessary for her to lodge the report and whether she was willing to lodge the report. She also explained that it was the ACA officer who proposed to her that she suggests to the accused that the money requested by him would be paid into his account and for her to ask the accused to give her his bank account number *vide* an sms. The accused agreed with her suggestion and sent her an sms which contained his bank account number.

[124] When the three tape recorded phone conversations (P4, P5 and P6) were played back to her in court during her further examination-in-chief, she was able to identify PW9's voice, her voice and the voice of the accused. In the 3rd taped recorded phone conversations she informed him that she had paid the money into his account and he said he would phone her the next day to inform her of the status of the case concerning PW3.

A **[125]** When she was cross-examined by the learned defence counsel, she agreed with his suggestion that in her 1st taped recorded conversation with the accused she was the first to broach the subject of money to the accused and that, thereafter, she had repeatedly broached the subject of money to the accused.

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[126] She also agreed with the suggestion of the learned defence counsel that in her 1st taped recorded conversation with the accused it was unclear the money was for what purpose except that it was mentioned by the accused that it was to seek the C assistance of the superior officer of the accused.

[127] She further agreed with the suggestion of the learned defence counsel that in her 1st taped recorded phone conversation with the accused the accused did not mention that the money was for his own use. The accused also did not mention D a sum of RM2,800.

[128] PW1 also agreed that the accused had said that his officer had asked for the money and that he (the accused) did not have the courage to take the money. The accused said that if his officer E was agreeable to take the money than it was alright, presumably, for her to pay the money. The accused also said after the money was transferred, presumably, into his account, he would take it and give it to his officer.

F **[129]** She also agreed that in all the three tape recorded phone conversations it was not clear what was the purpose of the payment of the money. She also agreed that the accused said he was merely following what was, presumably, said/instructed by the accused's officer and that the officer had asked for three, G presumably, meaning RM3,000, but the accused said twenty-eight was alright and that he would explain to his officer later. She further agreed that in the 1st and 2nd taped recorded phone conversations she did not at any point in time ask the accused who was the "pegawai".

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[130] The word "pegawai" is a malay word. It means "officer" in english.

[131] When she was re-examined, she agreed that it was not clearly stated in the three tape recorded phone conversations what I was the purpose of the payment of the money but she said she knew that the money was paid in order to close the two cases

involving PW3 and PW8 because the accused had told that to her, presumably, in person when she met up with him at the 2nd police station prior to the three tape recorded phone conversations.

[132] She also explained that in the 2nd tape recorded phone conversation the accused mentioned the figure 28 which she understood to mean 2,800 because his original request was RM1,500 for each case and it was a reduction of the original total of RM3,000 for the two cases.

[133] This court was of the view that based on the credible testimony of PW1 which was corroborated by the other supporting evidence which was adduced by the prosecution, there was cogent, credible and consistent evidence to establish a *prima facie* case that the accused had succumbed to temptation and had committed the offence as set out in the 2nd count of corruption.

[134] This court was also of the view that quite apart from the undisputed fact that the name and role of DW2 was never mentioned by the accused before he was called to the witness box, this court had evaluated the sworn oral testimony of the accused and that of DW2 in the light of the prosecution case. This court was satisfied that although the testimony of the accused appeared to be corroborated by that of DW2, based on the reasons as set out herein the defence did not cast a doubt on the prosecution case.

[135] In *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 FC, it was decided that the trial judge must consider the defence of the accused even though it was not revealed and put to the prosecution witnesses during the prosecution case and satisfy himself whether it had cast a doubt on the prosecution case.

[136] In view of the matters which have been discussed and referred to in these grounds of judgment this court was of the view that had the trial judge applied the principle of law as enunciated in *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 to the facts and circumstances of the case before him, the trial judge would still have arrived at his conclusion that the defence was an after-thought and was concocted in order to secure the acquittal of the accused by taking undue advantage of the fact that DW2 was his superior officer once upon a time.

[137] This court was, therefore, satisfied that the prosecution had succeeded in proving the 2nd count of corruption against the accused beyond reasonable doubt at the close of the case for the defence and upon the conclusion of the trial.

Appeal Against Sentence

[138] With regard to the accused's appeal against the sentence which was imposed upon him by the trial judge for the 2nd count of corruption this court was of the view that the sentence was not manifestly excessive.

[139] Corruption is a very grave offence. It has been recognized and accepted by parliament and the courts that it is necessary to impose a sentence of imprisonment for corruption as a sentence of fine has no deterrent effect (see *Hamidon Mat Yatim v. PP* [1995] 3 CLJ 724 HC; *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421 FC, and *PP v. Mohamed Fathi bin Hj Ahmad* [1978] 1 LNS 157 HC, which were cited by the trial judge in support of the custodial sentence meted out by him to the accused).

[140] The image of the government service is severely tarnished by corrupt civil servants whose salaries and allowances are paid by the taxpayers and they owe a duty to them to discharge and perform their duties honestly. The taxpayers feel betrayed when the law enforcers who include the police whom they depend on to protect them from those who break the law and commit crimes are let off the hook by corrupt law enforcers instead of being brought to justice.

[141] Apart from the feeling of betrayal there is also a feeling of outrage on the part of the taxpayers when civil servants who are convicted of corruption are given lenient sentences without any extenuating circumstances or mitigating factors.

[142] This court was, therefore, of the view that corruption is a serious menace which must be eradicated otherwise the people will lose heart and become disillusioned with the government and also the courts.

[143] One way of doing that is for the courts to impose sufficiently deterrent sentences on convicted offenders in order to send the message to other would-be offenders that corruption does not pay because if they are caught, charged and found guilty

they will not only lose their jobs, their gratuities and their pensions but they will also have to disgorge their ill-begotten gains, cough out four times more than the amount of their ill-begotten gains and serve time in prison.

[144] The trial judge also adopted the correct approach when he showed no sympathy to the accused who was aged 53 years at the time of sentencing and who would be retiring in two years time from the police force for the personal hardship which the accused, his wife and three of his five children who are still schooling will suffer upon the imposition of the custodial sentence on him.

[145] He cited the following often quoted excerpt in the judgment of Hashim Yeop A. Sani J in the case of *PP v. Loo Choon Fatt* [1976] 1 LNS 102 HC, in support of his reasoning:

> Presidents and Magistrates are often inclined quite naturally to be over sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach.

[146] This court is of the view that the accused should have known better than to do the corrupt act. He should have been mindful at all times to perform his official duties honestly and to appreciate the dire financial consequences, quite apart from the sense of shame, which will befall him and his family, in particular, his dependents, if he is weak, dishonest and succumbs to temptation by committing corruption.

Conclusion

[147] In the premises this court dismissed both the appeals. This court upheld the order of acquittal and discharge of the accused by the trial judge in respect of the 1st count of corruption. This court also upheld the accused's conviction and the sentence imposed on him by the trial judge in respect of the 2nd count of corruption.